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Nos. 80-2170 and 80-2171

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

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These petitions for a writ of certiorari seek review of the court of appeals' holding that the "one-House veto" provision in Section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. 1254(c)(2), is unconstitutional. The Immigration and Naturalization Service has filed an appeal (No. 80-1832) that presents the identical question. Although the House and Senate have moved to dismiss the INS's appeal on jurisdictional grounds, these petitions indicate that the Congress agrees with our submission in the Jurisdictional Statement in No. 80-1832 that the fundamental constitutional issue of separation of powers presented by the case

warrants review by this Court. The House also acknowledges (No. 80-2170 Pet. 19) that the decision below conflicts with *Atkins* v. *United States*, 556 F. 2d 1028 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978).

INS's appeal in No. 80-1832 brings the "whole case" before the Court, not just the constitutionality of Section 244(c)(2). *Williams* v. *Zbaraz*, 448 U.S. 358, 367-368 & n.10 (1980); *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975). The House and Senate therefore may advance on the government's appeal the same arguments they raise in their certiorari petitions, including that the court of appeals was without jurisdiction in this case.[1] Moreover, because INS's appeal in No. 80-1832 falls within this Court's obligatory jurisdiction under 28 U.S.C. 1252, that appeal is possessed of an inherent priority that petitions for a writ of certiorari do not share.

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[1] As we argued in the Jurisdictional Statement in No. 80-1832 (at 6-7 n.6), the court of appeals correctly rejected the House and Senate's contention that the court of appeals did not have jurisdiction of the case under 8 U.S.C. 1105a(a), that respondent Chadha had no standing to challenge the constitutionality of Section 244(c)(2), that the case presents a nonjusticiable political question, and that there is no Article III case or controversy because INS has taken the position that Section 244(c)(2) is unconstitutional. See J.S. App. 12a-24a; see also Reply Brief for the Appellant in No. 80-1832. That discussion need not be repeated here.

Moreover, as we pointed out in the Jurisdictional Statement in No. 80-1832 (at 6-7 n.6), Chadha's marriage to a United States citizen in August 1980—3-1/2 years after the deportation order was affirmed by the Board of Immigration Appeals (BIA)—does not moot the case. That marriage could provide a means for petitioner to become a permanent resident alien only if his wife filed an immediate relative petition (8 U.S.C. 1154(a); 8 C.F.R. 204.1(a)), which she has not done. In addition, even if such a petition were filed and granted by INS, the date of Chadha's eligibility for citizenship would run from the date *in the future* when he became a permanent resident alien in this manner, not from the 1974 date of the decision of the immigration judge suspending

Accordingly, we suggest that the Court hold these subsequently-filed petitions pending a decision on INS's appeal in No. 80-1832. If the Court later should conclude, even after oral argument, that it does not have jurisdiction under 28 U.S.C. 1252 of INS's appeal in No. 80-1832, the Court could grant the House and Senate's petitions at that time and dispose of the issue presented on the basis of those petitions.

Respectfully submitted.

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Chadha's deportation, as under the court of appeals' decision. He therefore retains a substantial stake in preserving the decision below. J.S. App. 17a-18a n.6.

For similar reasons, the passage of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, some three years after the BIA affirmed the order requiring Chadha's deportation, does not, contrary to the Senate's contention (Pet. 13-14), moot the case or require a remand to the court of appeals. This Act, even if it were held to be applicable to a deportation order issued three years earlier, would not provide a basis for Chadha to acquire permanent resident alien status as of 1974 and/or present eligibility for citizenship (based on the passage of five years since that time), as would the court of appeals' decision. See Section 209, 94 Stat. 105, (to be codified at 8 U.S.C. 1159).